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The Impact of Pacifica Foundation on Two Traditions of Freedom of Expression

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ARTICLES

THE IMPACT OF *Pacifica Foundation* ON TWO TRADITIONS OF FREEDOM OF EXPRESSION

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I. INTRODUCTION

THERE EXIST IN THIS NATION TWO TRADITIONS of freedom of expression: "that of the written and spoken word and that of the broadcast word."[1] The contrast between these two traditions is extraordinary. The first has its roots in the historic rejection of administrative licensing of the written word[2] and the popular repudiation of the Alien and Sedition Act of 1798.[3] This tradition regards prior restraints as virtually *verboten*[4] and all governmental regulation of the content of expression as inherently suspect.[5] In short, here freedom of speech is the rule and governmental regulation is an exception to be jealously confined within narrow, judicially defined, limits.

Anomalously, the tradition of broadcast expression in this nation has been precisely the opposite. It is a tradition of administrative licensing and governmental regulation of the content of expression by the Federal Communications Commission. Indeed, the powers of the FCC have never been judicially limited: "What has been missing in the controversy over FCC control is a precedent setting the *outer boundaries* of that control and establishing something that the Commission *cannot do*. . . ."[6]

The two traditions of freedom of expression have not coexisted easily. There has never been a definitive answer to whether the differential treatment of broadcast expression is attributable to anything more substantial than the historical accident which led to the creation of the Federal Communications Commission,[7] nor have the Supreme Court's efforts to identify a rational

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[1] Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 15 (1967).

[2] *See* Near v. Minnesota, 283 U.S. 697 (1931).

[3] *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

[4] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

[5] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Cohen v. California, 403 U.S. 15 (1971). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-88 (1978).

[6] Kalven, *supra* note 1, at 37-38 (emphasis in original).

[7] The Federal Radio Commission, predecessor agency to the Federal Communications Commission, was created in 1927 after judicial rulings that the Department of Commerce had no

ground for the anomalous status of broadcasting been profitable.[8] The inescapable conclusion seems to be that while the argument that the air waves constitute a scarce public resource is inadequate to distinguish the electronic and print media,[9] nevertheless administrative regulation of broadcast expression is permissible even though similar regulation of the print media would be violative of the first amendment.[10]

The United States Supreme Court, in *FCC v. Pacifica Foundation*,[11] had a magnificent opportunity to either begin the process of defining first amendment limitations on the scope of the authority of the FCC to regulate the content of broadcast expression, explicate a rational ground for the differential status of broadcasting, or perhaps both. Indeed, it could be argued that *Pacifica* was potentially the broadcast media's "own *Zenger* case."[12]

The *Pacifica* case arose when WBAI-FM, a New York City radio station, broadcast a program analyzing contemporary societal attitudes about language which included a monologue by humorist George Carlin[13] concerning "the words you couldn't say on the public . . . airwaves . . . ever. . . ."[14] The satirical monologue, which involved the repeated use of each of these seven words, was broadcast at 2 o'clock on a Tuesday afternoon in October 1973, following warnings that it contained sensitive language which some might find offensive.[15] The monologue was a selection from a phonograph record, "George Carlin, Occupation: FOOLE," available for purchase by both adults and children at most record stores. Several weeks

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statutory authority to refuse broadcast licenses even for the technical purpose of preventing overlapping signals and interference. The resulting chaos gave rise to the creation of the administrative agency to restore order through the device of licensing. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-77 (1969); NBC v. United States, 319 U.S. 190, 212-14 (1943).

[8] *See* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[9] *See, e.g.*, B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 90-92, 103-08 (1975); Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976); Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161 (1965).

[10] *Compare* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) *with* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[11] 438 U.S. 726 (1978). Other articles focusing on the *Pacifica* decision include: *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 148-63 (1978); 52 TEMP. L. Q. 170 (1979); 47 U. CIN. L. REV. 678 (1978).

For a discussion of the effects the *Pacifica* decision is likely to have on cable television programming, *see* 9 CUM. L. REV. 811 (1979).

[12] *See generally* Kalven, *supra* note 1, at 18. John Peter Zenger, a newspaper publisher, was tried in the State of New York on August 4, 1735, for seditious libel, having published various articles highly critical of the British governor of New York. Although his argument was contrary to precedent, and was not accepted until 1805, Zenger's attorney argued that truth was a defense to libel, winning acquittal for his client. While the actual importance of the *Zenger* case has been questioned, it is considered to be symbolic as part of the foundation for the freedom of press embodied in the first amendment. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (2d ed. 1972).

[13] Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d 94, 95 (1975).

[14] *Id.* at 100 (appendix). The seven words are shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. *Id.*

[15] *Id.* at 95-96.

later the FCC received a complaint from a man who heard the broadcast while driving with his fifteen-year-old son,[16] the only complaint received by either the radio station or the FCC.[17] Thereafter the FCC issued a Declaratory Order finding the broadcast of the words "patently offensive" and, while not "obscene," nevertheless "indecent" and hence violative of 18 U.S.C. § 1464 which proscribes the broadcast of "obscene, indecent, or profane language."[18] The FCC made it clear that its Order constituted a flat ban on the use of such words on the broadcast media, subject to the qualifications that "[w]hen the number of children in the audience is reduced to a minimum, for example during the late evening hours" the material might be "redeemed by a claim that it has literary, artistic, political or scientific value."[19] The FCC justified its Order on the grounds that broadcasts enter the home where the privacy of unconsenting adults and the protection of children from such words are legitimate concerns to be given primacy over the first amendment interests at stake.[20] The FCC Order was reversed by a divided panel of the United States court of appeals.[21]

The decision of the court of appeals was reversed by the United States Supreme Court, with four Justices dissenting.[22] The majority opinion, written by Mr. Justice Stevens, held that the broadcast of the Carlin monologue was "indecent" within the meaning of 18 U.S.C. § 1464 and that that statutory term had a separate and distinct meaning from the statutory term "obscene."[23] In Justice Stevens' view "indecent" encompassed any word the use of which was in "nonconformance with accepted standards of morality."[24] The majority also found that the Order did not violate the statutory prohibition of censorship by the FCC because it did not constitute a prior restraint.[25] Finally, the majority held that the Order did not violate the freedom of speech clause of the first amendment because the FCC's proscription of the

[16] *Id.* at 95.

[17] Pacifica Foundation v. FCC, 556 F.2d 9, 11 (D.C. Cir. 1977).

[18] 56 F.C.C.2d at 96, 99.

[19] *Id.* at 98. In a letter clarification the FCC stated that the order was "issued in a specific factual context" and refused to comment on hypothetical situations which might arise in the future. The FCC did suggest that it would not consider the order applicable to "public events . . . covered live [where] there is no opportunity for journalistic editing." Pacifica Foundation, Station WBAI-FM, 59 F.C.C.2d 892, 893 n.1 (1976).

[20] 56 F.C.C.2d at 97. The Commission also attempted to utilize the scarcity of airwaves argument to justify its order. *Id.* This argument was ignored by the Supreme Court. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting).

[21] Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). Circuit Judge Leventhal dissented. *Id.* at 30.

[22] J.J. Stewart, Brennan, White, and Marshall dissented on the ground that " 'indecent' should probably be read as meaning no more than 'obscene,' " and that 18 U.S.C. § 1464 should be construed to prohibit only the broadcast of language which is "obscene," in order to avoid the difficult constitutional issues which otherwise would be raised. The Carlin monologue was conceded not to be "obscene." FCC v. Pacifica Foundation, 438 U.S. 726, 778 (Stewart, J., dissenting). J.J. Brennan and Marshall also dissented on first amendment grounds. *Id.* at 762.

[23] *Id.* at 740-41.

[24] *Id.* at 740.

[25] *Id.* at 735-38. The Court traced the legislative history of the censorship provisions of the Communications Act of 1934, specifically 18 U.S.C. § 1464, and concluded that "[t]he prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance . . . " although the Commission does retain the power to "review the content of the completed broadcasts in the performance of its regulatory duties." *Id.* at 735.

broadcast of "indecent" language on a uniquely pervasive medium of expression was justified by the governmental interests in protecting juveniles and unwilling adults who might be exposed to the language.[26]

The purpose of this article is not to debate the wisdom of the use of sensitive language on the electronic media or elsewhere. The admonition that the perceived wisdom of governmental regulations should never be confused with the issue of their constitutionality remains appropriate.[27] Nor is it our purpose to debate the substantive question of whether the Court reached the proper result in *Pacifica*, although we will necessarily have much to say by implication on this issue. The purpose of this article is rather to assess the impact of *Pacifica* on the two traditions of freedom of expression which continue to coexist uneasily in our nation. An assessment of the impact of *Pacifica* is of particular importance because "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."[28]

Our concern is not primarily the narrow holding of the Supreme Court, but rather the fact that, in reaching its conclusion, the Court failed to delineate *any limitations whatsoever* on the power of the FCC to control the content of broadcast expression. After *Pacifica* this country remains without a judicial pronouncement from its highest court of *anything* the Federal Communications Commission cannot do. Indeed, in the eyes of the concurring Justices, what had heretofore been a matter of established first amendment jurisprudence has now become something the FCC "should consider . . . as it develops standards in this area."[29]

The impact of *Pacifica* on the tradition of non-broadcast expression is also a matter of grave concern. In the extraordinarily harsh language of Justice Brennan, the *Pacifica* majority was engaged in nothing less than an "attempt to unstitch the warp and woof of First Amendment law."[30] Justice Brennan's statement cannot be dismissed as the rhetoric of a dissenter. The two concurring Justices, whose votes were necessary to the holding that the broadcast of Carlin's monologue was not constitutionally protected, specifically rejected Justice Stevens' rationale that the level of first amendment protection should vary depending upon a judicial assessment of the value of the particular speech.[31] On the other hand, the result in *Pacifica* could not be justified, in the view of Justice Stevens, unless the first

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[26] *Id.* at 748-51. Radio broadcasts confront the citizen, "not only in public, but also in the privacy of the home [or car], where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"; where any individual, adult or juvenile, may unwittingly tune in to hear such "indecent" language. *Id.* at 748. Although five members of the Court concurred in this constitutional conclusion, there was a split within the majority as to the proper underlying rationale. Thus, in parts IV-A and IV-B of his opinion, Justice Stevens spoke for himself, Chief Justice Burger and Justice Rehnquist. *Id.* at 742-48. Justices Powell and Blackmun concurred specially in order to disassociate themselves from these portions of Stevens' opinion and state their own rationale for reaching the same conclusion on the constitutional questions. *Id.* at 755.

[27] *See, e.g.*, Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922).

[28] Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963).

[29] 438 U.S. at 760 (Powell, J., concurring).

[30] *Id.* at 775 (Brennan, J., dissenting).

[31] *Id.* at 761 (Powell, J., concurring).

amendment interests were denigrated by a judicial finding that the particular expression was less valuable than the speech involved in prior cases.[32] Simply stated, the result in *Pacifica* was dependent upon a combination of two rationales, neither of which a majority of the Court would find constitutionally appropriate. In spite of this, it is clear that *Pacifica* casts doubt on a large body of first amendment precedent, even though little effort was made by either Justice Stevens or Justice Powell to distinguish past cases. This is a matter of particular concern inasmuch as the Supreme Court has, at least on one recent occasion, adopted a last in time, first in right approach to its own precedent.[33]

This article will first discuss the nature and extent of FCC regulation of broadcast expression which remains intact following *Pacifica*. Therafter it will analyze the issues raised by the mode of statutory construction utilized by the majority in *Pacifica*. Finally, the first amendment doctrines which have been affected by the rationales offered by the prevailing opinions will be critically examined.

II. The Regulatory Background Ignored in *Pacifica*

The Supreme Court confined its review in *Pacifica* to the narrow issue of whether "the Carlin monologue was indecent as broadcast."[34] In support of this limited scope of judicial review it was argued that the FCC's Order was an adjudication as opposed to the promulgation of a rule or regulation,[35] that the Court should limit its review in order to avoid the unnecessary decision of constitutional issues,[36] and that any chilling effect on broadcasters would be minimal,[37] or in any event, would deter only offensive language "at the periphery of First Amendment concern."[38] In addition, Justice Powell believed that "this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts."[39]

There are sound objections to each of the proffered justifications for narrowly limiting the scope of judicial review to the specific holding of the FCC. The FCC clearly treated its Order as the promulgation of a general standard suitable for future application.[40] Since the Supreme Court itself has

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[32] *Id.* at 745 & n.20.

[33] In Hudgens v. N.L.R.B., 424 U.S. 507, 517-18 (1976), the Court announced that Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), had been overruled by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), despite the fact that *Lloyd* had carefully, if painfully, distinguished *Logan Valley Plaza*.

[34] 438 U.S. at 742, 744. This theme appears throughout the majority opinion, *id.* at 734, 741 and Justice Powell's concurring opinion, *id.* at 755, 760, 761 n.4 (Powell, J. concurring).

[35] *Id.* at 734; *id.* at 761 n.4 (Powell, J., concurring).

[36] *Id.* at 734; *id.* at 756 (Powell, J., concurring).

[37] *Id.* at 743 & n.18; *id.* at 761 n.4 (Powell, J., concurring).

[38] *Id.* at 743.

[39] *Id.* at 756 (Powell, J., concurring).

[40] Thus, the Order stated that it was intended "to clarify the standards which the Commission utilizes to judge 'indecent language' " and to "permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration." Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d 94, 99 (1975). Indeed, this was precisely the reason why the FCC issued a declaratory order rather than imposing direct sanctions on Pacifica Foundation. *Id. See also* Report on the Broadcast of Violent, Indecent,

recognized the ease with which administrative agencies can abuse the distinction between adjudication and rulemaking,[41] the Court's reliance on dubious formality in characterizing the Order in *Pacifica* seems especially inappropriate. And even if the Order in *Pacifica* was correctly deemed to be adjudicative, such a characterization hardly relieves the Court from the strictures of the *Chenery* doctrine which requires that an administrative adjudication be reversed, even if correctly decided, if the agency's rationales for its decision are incorrect.[42] While the avoidance of unnecessarily deciding constitutional issues is certainly an honored principle, it is myopic to apply it where the result would be to uphold an agency order which promises to raise more constitutional questions in future cases than the first decision will avoid. And, in order to determine whether such is the case, a sensitive consideration of the full import of the administrative regulation is essential. The refusal to apply the overbreadth doctrine in *Pacifica* is also questionable. When the governmental regulation is aimed at the content of the expression, as it was in *Pacifica*, the overbreadth doctrine has traditionally been enforced in its full vigor.[43] Further, the extent and area of impact of any chilling effect on broadcasters as a result of *Pacifica* can hardly be confidently predicted without an inquiry into the regulatory background underlying the FCC's action. Finally, the argument of Justice Powell that a narrowly focused scope of review is conducive to the proper development of this area of governmental speech control is dependent upon the accuracy of his assertion that the "Commission may be expected to proceed cautiously, as it has in the past."[44] This can be determined only by a consideration of the history of the FCC in exercising its authority to regulate sensitive language. Ultimately the problem of the Court's narrow focus in *Pacifica* was not that it limited its decision to the specific facts of the case, but, rather that by ignoring the regulatory background and the full import of the FCC's asserted authority, the Court decided the case in a vacuum divorced from "the realities of the relationship between the Federal Communications Commission and radio licensees."[45]

An appreciation of the true impact of the Supreme Court's decision in *Pacifica* must begin with an understanding of the expansive and bureaucratically inscrutable regulatory scheme adminstered by the FCC. The FCC traditionally has claimed two sources of statutory authority for its control over the broadcast of material it deems unsuitable. First, the FCC has invoked an asserted power to enforce the prohibition, found in 18 U.S.C. § 1464, of the use of "any obscene, indecent, or profane language by means of

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AND OBSCENE MATERIAL, 51 F.C.C.2d 418 (1975). The FCC's comment, upon reconsideration, that the Order was issued in a "specific factual context" should hardly change the analysis inasmuch as the FCC recognized that the Order was intended to apply to many situations which might arise in the future. Pacifica Foundation, Station WBAI-FM, 59 F.C.C.2d 892, 893 (1976).

[41] *See, e.g.*, N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).

[42] SEC v. Chenery Corp., 332 U.S. 194 (1947).

[43] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971).

[44] 438 U.S. at 761 n.4 (Powell, J., concurring).

[45] Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (Bazelon, C. J., dissenting). For a discussion of this relationship, see *id.* at 407.

radio communications."[46] Second, the agency has relied upon its general authority to regulate broadcasting in the "public convenience, interest, or necessity."[47]

This potentially far-reaching power of the FCC to regulate the content of broadcast expression is encouraged by the Supreme Court's refusal to consider what limits, if any, exist to govern the FCC's application of the public interest criteria.[48] In the past the Court, in other contexts, has construed the scope of the FCC's authority to regulate under the public interest standard very broadly.[49] Despite some indications to the contrary,[50] the FCC has relied on these precedents to justify an expansive application of the public interest standard to broadcast expression it finds unseemly.[51]

The major threat to freedom of expression, however, is not the breadth of the FCC's substantive public interest criteria, although this too is a matter of serious concern, but is rather two corollary applications of the standard. First, the Commission requires each broadcaster to exercise a stringent self-censorship by mandating that he ascertain the content of all material broadcast and, second, adopt a policy governing the suitability of material for airplay. Thus, in its public notice concerning the responsibility of licensees to review records before allowing them to be broadcast,[52] the Commission, while not declaring the playing of "drug-oriented songs" to be contrary to the public interest, nevertheless mandated that the public interest required that broadcasters ascertain the content of each and every song before airplay in order to determine "drug-orientation."[53] If the broadcaster violates his own policy concerning the suitability of material for broadcast, the violation of the station's policy is deemed to be violative of the public interest even if the material broadcast is itself not inappropriate under that standard.[54] The

[46] *See, e.g.*, Trustees of the Univ. of Pa., 57 F.C.C.2d 782 (1975); Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d 94 (1975); Sonderling Broadcasting Corp., WGLD-FM, 41 F.C.C.2d 777 (1973).

[47] 18 U.S.C. § 303(g) (1970). *See, e.g.*, Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d 94 (1975); WUHY-FM, Eastern Educational Radio, 24 F.C.C.2d 408 (1970); Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970).

[48] 438 U.S.at 739 n.13.

[49] *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[50] *See, e.g.*, WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d at 412-13 (public interest criteria identical to 18 U.S.C. § 1464 criteria); Complaint of Oliver R. Grace, 22 F.C.C.2d 667, 668 (1970) ("The charge that the broadcast programs are vulgar or presented without 'due regard for sensitivity, intelligence, and taste', is not properly cognizable by this Government agency."); Pacifica Foundation, 36 F.C.C. 147 (1964) (FCC will not ban provocative programming which might offend some listeners).

[51] *See, e.g.*, Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962); Mile High Stations, Inc., 28 F.C.C. 795 (1960).

[52] License Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409 (1971), *aff'd sub nom.* Yale Broadcasting Co. v. F.C.C., 478 F.2d 594 (D.C. Cir. 1973).

[53] *Id. See also* WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408 (1970) (holding a licensee to be grossly negligent for failing to prevent the airing of profanities contained in a taped interview); Mile High Stations, Inc., 28 F.C.C. 795 (1960) (applying a sanction against a licensee which knowingly permitted a speaker to continue making suggestive remarks); Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2310 (1960).

[54] *See, e.g.*, Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970); Pacifica Foundation, 6 Rad. Reg. (P-F) 570 (1965).

combination of these administratively created principles, which permit a licensee to be found to have acted contrary to the public interest if he either fails to ascertain the content of all material broadcast (surely an impossible requirement), fails to have an adequate policy on the matter, or violates his own "voluntarily" adopted policy, gives the FCC *carte blanche* to control the content of broadcast expression.

The nature and scope of the remedial powers at the disposal of the FCC further exacerbate the problem of administrative supervision of the content of broadcast expression. One of the remedies available to the FCC is the power to impose a forfeiture or monetary penalty upon a licensee for the violation of 18 U.S.C. § 1464.[55] While the FCC continues to utilize this sanction,[56] its use has been judicially condemned because it fails to afford the licensee the procedural safeguards which are required by the first amendment.[57] Similarly, the FCC's authority to revoke[58] or suspend[59] the license of a broadcaster who violates the FCC's conception of material suitable for broadcast is also subject to the criticism that procedures required by the first amendment are ignored. Thus, for example, the FCC's procedures make no provision for a prompt judicial determination of the constitutional status of the material broadcast, and the burden of seeking judicial review of an agency determination is placed on the licensee rather than the censoring administrative body.[60]

Perhaps the most important procedural safeguard lacking in the FCC procedure is one which has never been specifically mentioned in the first amendment context by either courts or commentators. Common to the operation of all FCC sanctions for the broadcast of material deemed unsuitable by the agency is a lack of separation of functions.[61] The FCC commissioners act as investigators, prosecutors, and judges. Such a lack of separation of functions was a common feature of administrative licensing schemes condemned in the past and drastically increases the propensity to adverse decision, one of the core objections to systems of prior restraint.[62]

The most potent sanction for the broadcast of material deemed to be unsuitable by the Commission is the agency's authority to deny license renewal to the offending broadcaster.[63] This sanction too is woefully inadequate in its provision of procedural safeguards. The nonrenewal sanction lacks all the safeguards which likewise are absent in the forfeiture, license revocation, and suspension proceedings. In addition, the burden of proof that renewal would be in the public interest is on the broadcaster,[64]

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[55] 47 U.S.C. § 503(b) (1976).

[56] *See* Trustees of the Univ. of Pa., 57 F.C.C.2d 782 (1975).

[57] Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1972).

[58] 47 U.S.C. § 312(a) (1976).

[59] *Id.* § 303(m)(i).

[60] *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965).

[61] *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT 254-70 (3d ed. 1972).

[62] *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

[63] 47 U.S.C. § 309(a) (1976).

[64] *Id.* § 309(e). *See* Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Charles P. B. Pinson, Inc. v. FCC, 321 F.2d 372 (D.C. Cir. 1963); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

despite the fact that, in the nonbroadcast context, the Supreme Court has made it plain that the first amendment requires that the censoring agency carry the burden of proof.[65] As important as these procedural deficiencies are, it is inappropriate to focus on them exclusively. The most important objection to the renewal sanction of the FCC is not formalistic but realistic.

The blunt reality is that a broadcaster needs a license from the Commission to remain in business. The FCC license is thus the broadcaster's most valuable commercial asset; indeed, the value of the broadcaster's other assets are contingent upon the continued possession of a license from the FCC. Such licenses are, by statute, limited to a maximum duration of three years.[66] At the end of each three year period the FCC will renew the license if the broadcaster carries the burden of proof of operation in the public interest.[67] Most licenses are summarily renewed without FCC scrutiny, but every programming complaint received by the Commission is forwarded to the licensee for comment and, regardless of how frivolous, is placed in the licensee's file for possible agency consideration at renewal time. Thus, the broadcaster is continually reminded by the Commission of its power to require costly renewal hearings and deny renewal if the broadcaster has failed to adhere to the agency's conception of the public interest.[68] It is not surprising that it has been remarked that the FCC dossiers "bear a haunting analogy to the FBI files on individuals during the hey-day of the loyalty programs in the 'fifties.' "[69]

The practical effect of the FCC's power to deny renewal has been explained as follows:

> [T]he renewal process has become the primary method through which the Commission exercises day-by-day control over virtually all broadcast operations, and particularly over program practices and program operations. Thus, the fact that the licensee must go through the trial and prove himself every three years is in a very real sense a "Sword of Damocles" over the broadcaster's head. If the Sword does not often fall, neither is it ever lifted and the *in terrorem* effect of the sword's presence enables the Commission to exercise far-reaching powers of control over the licensee's operations.[70]

As a result of this *in terrorem* effect of the threat of FCC utilization of the nonrenewal sanction, the agency is empowered, in reality, to further control the content of broadcast expression by the use of numerous informal methods which have been termed "regulation by the lifted eyebrow."[71] Thus, the Commission can, and does, exercise far-reaching control over the content of broadcast expression by informal methods such as public speeches by

[65] *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Speiser v. Randall, 357 U.S. 513 (1958).

[66] 47 U.S.C. § 307(c) (1976).

[67] *Id.*

[68] Kalven, *supra* note 1, at 21.

[69] *Id.*

[70] Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967).

[71] Miami Broadcasting Co., Station WQAM, 14 Rad. Reg. (P-F) 125, 128 (1956) (Commissioner Doerfer, dissenting).

commissioners and letters and telephone calls from the commissioners or their staff to stations indicating precisely what the Commission likes or dislikes about the station's programming. It was in this manner, for example, that the Commission bludgeoned all three major television networks into adopting the "Family Viewing" hour.[72]

The effect of the FCC's methods has cast a pervasive pall of self-censorship over broadcast expression, with the licensees almost invariably bowing to Commission dictates. Entire programs are cancelled,[73] broad categories of material, including much that is unobjectionable, are removed from the air waves,[74] and programming policies are adopted by broadcasters[75] in response to FCC wishes. The Commission's view of this self-censorship can most charitably be described as indifference:

> The fact that Sonderling [Broadcasting Corp.] has abandoned its sex-talk show and alleges that other stations may have done the same thing is not disturbing in itself.
>
> ....
>
> If the licensee goes beyond the requirements of the law and drops sexual material altogether, as Sonderling says he did here, that is an act of licensee judgment. We assume that the licensee takes into consideration the tastes, needs and interests of his community in making this judgment. We take no position as to whether Sonderling's dropping of the program was good or bad, or whether it was or was not in the public interest.[76]

This FCC power to control the content of broadcast expression is virtually immunized from judicial review for three interrelated reasons. First, the economic value of a broadcast license is so great that "faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury."[77] Second, the FCC renewal procedure, in which the broadcaster bears the burden of proof that his overall past performance has been in the public interest, tends to preclude judicial review of any particular incident or programming decision.[78] Finally, the FCC has traditionally followed an invidious policy of selective enforcement which exacerbates the first two factors. It invariably proceeds formally

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[72] *Compare* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Calif. 1976) (holding FCC tactics unconstitutional) *with* REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418 (1975) (FCC's self-satisfied description of effectiveness of its tactics).

[73] *See, e.g.*, Trustees of the Univ. of Pa., 57 F.C.C.2d 782 (1975); Sonderling Broadcasting Corp., WGLD-FM, 41 F.C.C.2d 777 (1973); WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408 (1970).

[74] *See* Yale Broadcasting Co. v. FCC, 478 F.2d 594, 603 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

[75] *See* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Calif. 1976).

[76] Sonderling Broadcasting Corp., WGLD-FM, 41 F.C.C.2d at 783-84.

[77] Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (Bazelon, C.J., dissenting).

[78] *See* Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 669 (1971); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 700, 703 (1964).

against small, noncommercial stations which cannot afford to litigate the legality of the FCC's action, thus assuring that the standards which the agency applies informally against the larger commercial stations and networks are formally established virtually by default.[79]

The Supreme Court in *Pacifica* completely ignored the regulatory framework in which the case arose. In striking contrast, in the arena of nonbroadcast expression, the Court has held that the very existence of such an informal censorship scheme, superimposed upon a formal regulatory procedure and largely obviating the need for the formal regulatory procedure, is violative of the first amendment.[80] It need not be argued that the Court in *Pacifica* should have rendered a broad holding that the FCC regulatory process for controlling the content of broadcast expression is wholly unconstitutional. The more fundamental flaw of *Pacifica* was that the Court not only ignored the vices of the FCC regulatory process but assumed, contrary to reality, that there was no danger of any undue inhibition of broadcast expression[81] and that the agency would proceed cautiously in the future, mindful of first amendment limitations on its authority.[82] The Court then relied on these dubious factual assumptions to justify not only its refusal to invoke the overbreadth doctrine but also to rationalize its disregard of the regulatory framework in its construction of the statutes governing the FCC's action in *Pacifica*. What the Court did was nothing less than "deciding great issues in a vacuum and giving us a parody of legal wisdom."[83] As a result, the power of the FCC to control the content of broadcast expression remains completely free of judicially imposed limits.

III. The Statutory Construction Issues

When freedom of expression issues are present, the principle that statutes should be construed in such a manner as to avoid raising questions as to their constitutionality historically has assumed a special importance. The first amendment guarantee of freedom of expression embodies a fundamental legal principle designed to serve as an explicit limitation on the exercise of governmental authority. But this is not the only purpose of the first amendment. It also constitutes a legal manifestation of a long and honorable tradition of unfettered expression by the people of a free country. This tradition traces its existence to the very establishment of the United States as a free and independent nation, an event which would not have occurred absent the caustic, unpleasant, and even indecent propaganda efforts of the founding fathers.[84]

There followed a period of over one hundred years during which, with

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[79] *See* WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 423 (1970) (Commissioner Johnson, dissenting); Jack Straw Memorial Foundation, 21 F.C.C.2d 833, 838-39 (1970) (Commissioner Cox, dissenting).

[80] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

[81] 438 U.S. at 743. *See also id.* at 761 n.4 (Powell, J., concurring).

[82] *Id.* at 761 n.4 (Powell, J., concurring).

[83] H. Kalven, The Negro and the First Amendment 85 (1965).

[84] *See, e.g.*, B. Bailyn, The Ideological Origins of the American Revolution (1967); P. Davidson, Propaganda and the American Revolution (1941).

one exception, there existed no federal legislation regulating the expressive activities of a free people. The one exception was the hated Alien and Sedition Act of 1798, and the popular reaction to this repressive measure only enhanced the national tradition that expression should be "uninhibited, robust, and wide-open."[85] Thus, Professor Chafee has said of the first amendment:

> [I]t is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of public discussion of all public questions. Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional.[86]

While the Supreme Court has consistently honored this national tradition by construing statutes to avoid the "constitutional danger zone" marked by the first amendment,[87] the most eloquent statement of the principle is that of Learned Hand:

> It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.[88]

This principle of statutory construction was unfortunately dishonored by the Supreme Court majority in *Pacifica*. Justice Stevens, who had so carefully limited the focus of judicial review to the precise factual holding of the FCC in order to avoid the unnecessary decision of constitutional issues, ignored the same considerations not once but twice when he turned his attention to the judicial construction of the two applicable statutes. A sensitive construction of either statute would have rendered unnecessary a judicial decision on the serious constitutional question of whether the FCC's prohibition of the broadcast of the Carlin monologue was violative of the first amendment.

The first issue of statutory construction presented in *Pacifica* was whether the FCC's action constituted forbidden censorship within the meaning of 47 U.S.C. § 326, which provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio com-

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[85] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[86] Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 6 (1941).

[87] Yates v. United States, 354 U.S. 298, 319 (1957). *See also* Hamling v. United States, 418 U.S. 87 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[88] Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

> munications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[89]

Going far beyond the facts of the particular case, Justice Stevens held, first, that section 326 prohibits only the imposition of prior restraints on the content of broadcast expression by the FCC and that section 326 is wholly inapplicable when the Commission imposes a subsequent punishment upon a broadcaster for airing expression which the agency, for any reason, finds inappropriate.[90] Even apart from the general principle of liberal construction to avoid constitutional questions, this construction of section 326 is open to serious dispute.

Justice Stevens relied on two sources of authority in support of this position. First, he noted that lower courts had limited this provision to a proscription of prior restraints on two occasions during the period between 1927, when section 326 was originally enacted, and 1934, when it was reenacted by Congress.[91] This is true, but of dubious significance. The first case relied on by Justice Stevens was *KFKB Broadcasting Association v. Federal Radio Commission*,[92] the rationale of which was "clearly rejected by the Supreme Court's opinion"[93] in *Near v. Minnesota*.[94] The second case cited by Justice Stevens was *Trinity Methodist Church v. Federal Radio Commission*,[95] where the lower court erroneously relied upon *KFKB Broadcasting* and affirmed the denial of license renewal to a radio station whose religious programming was officially deemed offensive to other people's "religious sensibilities."[96] Thus, it is not surprising that knowledgeable commentators, referring to Stevens' interpretation of section 326, have concluded that "today it is familiar learning that this is a totally mistaken view."[97]

The *Pacifica* majority's second argument in support of the proposition that section 326 prohibits only prior restraints by the FCC was that this represents the consistent interpretation of the Commission and the District of Columbia Court of Appeals.[98] The difficulty with this argument is three-fold. First, it is simply erroneous insofar as it ignores the many cases in which section 326 has been deemed applicable to subsequent restraints on the content of broadcast expression by the FCC[99] and the District of Columbia Court of Appeals.[100]

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[89] 47 U.S.C. § 326 (1970).

[90] 438 U.S. at 735-36.

[91] *Id.*

[92] 47 F.2d 670 (D.C. Cir. 1931).

[93] Robinson, *supra* note 70, at 105.

[94] 283 U.S. 697 (1931).

[95] 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

[96] *Id.* at 853.

[97] Kalven, *supra* note 1, at 26. *See also* Robinson, *supra* note 70, at 105.

[98] 438 U.S. at 737.

[99] See, *e.g.*, The Polite Society, Inc., 55 F.C.C.2d 810 (1975); WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 409-10 (1970); Oliver R. Grace, 22 F.C.C.2d 667-8 (1970).

[100] *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169 (D.C. Cir. 1978), *cert. denied*, 394 U.S. 930 (1969).

Second, the Court, by relying on authority which held, at most, only that a particular subsequent restraint was not violative of section 326,[101] endorses the *non sequitur* that because some subsequent restraints do not violate section 326, none do. Third, Justice Stevens ignored the construction which the United States Supreme Court had previously given to a similar provision of the Communications Act of 1934:

> The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of "objectionable" material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give "censorship" a narrower meaning in § 315. . . . Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication.[102]

When Chief Justice Burger sat on the Court of Appeals for the District of Columbia, he found this mode of statutory interpretation fully applicable to a construction of section 326.[103] In *Pacifica*, however, the majority ignored Burger's holding in *Anti-Defamation League of B'Nai B'Rith v. FCC* and instead cited dicta found in a footnote in a concurring opinion written by Judge Wright to the effect that a license renewal based on vulgar programming would not violate section 326.[104] This footnote cannot reasonably be thought to support the broad proposition for which it is cited — that section 326 is wholly inapplicable to all subsequent restraints by the FCC — since Judge Wright expressly concurred in Burger's broad interpretation of section 326 and was merely suggesting the existence of a narrow exception to the general principle endorsed in the majority opinion.[105]

As an alternative ground for holding that section 326 did not bar the FCC proscription of the broadcast of the Carlin monologue, the *Pacifica* majority held that section 326 must "be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language" found in 18 U.S.C. § 1464.[106] Although Judge Wright's footnote dicta might have been invoked, the *Pacifica* majority cited no precedent in support of this construction of section 326. Instead, Justice Stevens reasoned simply that sections 326 and 1464 were originally contained in the same section of the Communications Act of 1934, that "Congress intended to give meaning to both provisions," and that the removal of section 1464 from the Communications Act to the Criminal Code "cannot reasonably be interpreted as having been intended to change the

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[101] *See* 438 U.S. at 737 n.11.

[102] Farmers Educ. & Cooperative Union v. WDAY, 360 U.S. 525, 527, 529-30 (1959) (emphasis in original) (footnote omitted).

[103] Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969).

[104] 438 U.S. at 737, *quoting* Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d at 173 n.3.

[105] 403 F.2d at 172.

[106] 438 U.S. at 738.

meaning of the anticensorship provision."[107] Of course, one could reasonably differ with Justice Stevens. Indeed, inasmuch as the anticensorship "provision was discussed only in generalities when it was first enacted" and the legislative history can only be said not to contradict Stevens' conclusion,[108] it is unfortunate that the Court chose to ignore the noble principle of statutory construction announced by the Court in *WDAY* that, in light of our national tradition of freedom of expression, only a "clear expression of legislative intent . . . [or] other convincing reason" will justify such a narrow interpretation of a congressional anticensorship statute.[109] This is especially true where a liberal interpretation of section 326 would have avoided the necessity for judicial resolution of an extremely difficult constitutional question.

The second issue of statutory construction presented in *Pacifica* was whether the FCC proscription of the broadcast of the Carlin monologue was authorized by 18 U.S.C. § 1464, which prohibits the utterance of any "obscene, indecent, or profane language by means of radio communication."[110] Again the Supreme Court majority in *Pacifica* failed to make use of an opportunity to construe this statutory provision in such a manner as to avoid the necessity of deciding a serious constitutional question. In brief, the *Pacifica* majority refused to hold that the concept of "indecent" speech was subsumed within the legal concept of obscenity and instead found that the statute should be read disjunctively to prohibit three separate and distinct categories of expression: the "obscene," the "indecent," and the "profane."[111]

In order to appreciate the significance of this holding it is necessary to understand the expansion of the category of unprotected speech which the Supreme Court sanctioned in *Pacifica*. The Supreme Court has held, by slim majorities, that obscenity is not protected by the first amendment. Its current definition of unprotected obscentiy was set forth in *Miller v. California*:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[112]

The Federal Communication Commission's definition of indecency within the meaning of section 1464, at least "at times of the day when there is a reasonable risk that children may be in the audience,"[113] deleted all of the *Miller* requirements for obscenity except one, which was altered. Unlike obscenity, indecency need not appeal to the prurient interest, need not be

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[107] *Id.*

[108] *Id.*

[109] Farmers Educ. & Cooperative Union v. WDAY, 360 U.S. at 527 (1959).

[110] 18 U.S.C. § 1464 (1976).

[111] 438 U.S. at 739-40.

[112] Miller v. California, 413 U.S. 15, 24 (1973).

[113] Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d at 98.

taken as a whole, and may have, in context, serious literary, artistic, political, or scientific value. According to the FCC, indecency is merely "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. . . ."[114] This definition is broad enough, in the view of the FCC, to encompass not only words with more than one accepted usage, so long as one meaning is descriptive of sexual or excretory functions, but also discussions of sexual topics even if no offensive words are used.[115] While the Court sought to limit its holding in *Pacifica* to an affirmance of the specific Order issued by the FCC, Justice Stevens went beyond endorsing the FCC definition of indecent and offered an even broader construction: " 'indecent' merely refers to non conformance with accepted standards of morality."[116]

In order to reach its conclusion that the statutory term indecent should be given independent legal significance, the *Pacifica* majority was forced to distinguish a large body of persuasive authority to the contrary. Previously the Court had "construed the term indecent in related statutes to mean obscene, as that term was defined in *Miller v. California*."[117] Thus, in 1973 the Supreme Court stated:

> [W]e do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised" and "a construction of the statute is fairly possible by which the question may be avoided." . . . If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*. . . .[118]

The four dissenters in *Pacifica* found this analysis fully applicable to section 1464, a companion statute to section 1461: "Nothing requires the conclusion that the word indecent has any meaning in § 1464 other than that ascribed to the same word in § 1461."[119] The majority opinion attempted to rebut this construction by relying on the fact that "the Commission has long

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[114] *Id.*

[115] *See id.* (the Carlin monologue was found to be indecent even though the seven words were usually used in contexts unrelated to sexual or excretory functions or activities); WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408 (1970) ("shit" and "fuck" are indecent when used in a non-sexual context for emphasis); Sonderling Broadcasting Corp., WGLD-FM, 27 Rad. Reg. (P-F)2d 285 (1973) (discussion of oral sex indecent despite total absence of offensive words).

[116] 438 U.S. at 740. Justice Powell, concurring, used as a standard whether "the language employed is, to most people, vulgar and offensive." *Id.* at 757 (Powell, J., concurring).

[117] *Id.* at 740.

[118] United States v. Twelve 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973) (citations omitted). *See also* Marks v. United States, 430 U.S. 188 (1977) (construing 18 U.S.C. § 1465); Hamling v. United States, 418 U.S. 87 (1974) (construing 18 U.S.C. § 1461); United States v. Orito, 413 U.S. 139 (1973) (construing 18 U.S.C. § 1462); Manual Enterprises, Inc. v. Day, 370 U.S. 478, 483 (1962) (construing 18 U.S.C. § 1461).

[119] 438 U.S. at 779 (Stewart, J., dissenting) (footnote omitted).

interpreted § 1464 as encompassing more than the obscene."[120] There are several difficulties with this reasoning. First, it ignores the fact that in so construing section 1464 the FCC initially recognized the dubious constitutionality of its construction by taking the position that "the matter is one of first impression, and can only be definitively settled by the courts" and inviting judicial review of the agency's construction.[121] Second, the majority's analysis ignores the fact that the FCC's position that similar language in 47 U.S.C. § 223, proscribing "obscene, lewd, lascivious, filthy, or indecent" telephone calls, is applicable only to *obscene* calls.[122] Third, the *Pacifica* majority was simply disingenious in its reliance on the construction tentatively given section 1464 by the FCC while, at the same time, ignoring the fact that the only federal court to reach the issue had construed the term indecent to be synonymous with the term obscene.[123] Finally, while the legislative history of section 1464 is silent on this issue, Justice Stewart's argument in dissent that the codification of sections 1461, 1462, 1464, and 1465 together in a single chapter entitled "Obscenity" is the best available evidence of legislative intent seems persuasive.[124] The best response the majority opinion could muster was the bare conclusory assertion that, since section 1461 applies to the mails and section 1464 to the media, "[i]t is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means."[125] At bottom the majority's construction of section 1464 rests on nothing more substantial than its assumption of what would constitute a realistic imputation of legislative intent.

In light of the tenuous foundation for the *Pacifica* majority's reading of the technical meaning of section 1464, it would seem that the invocation of the principle that statutes should be construed in such a manner as to avoid serious question of their constitutionality would have been particularly appropriate. In the majority's view, however, this principle was simply inapplicable because "it is well settled that the First Amendment has a special meaning in the broadcasting context."[126] Again the majority's rationale hardly seems adequate. The Court's own precedent has never satisfactorily explained why broadcasting should be subject to a special, less strict, first amendment standard.[127] In any event, in each case where a differential standard has been applied to the broadcast medium, it has been done in order to expand the first amendment rights of listeners to access to a diversity of material.[128] Indeed, the Supreme Court itself has recognized, in *Red Lion Broadcasting Co. v. FCC*, that the sort of Commission action at issue in *Pacifica* could not be

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[120] *Id.* at 741 (footnote omitted).

[121] WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 412-15 (1970).

[122] *See* 438 U.S. at 780 n.7 (Stewart, J., dissenting).

[123] *See* United States v. Simpson, 561 F.2d 53, 60 (7th Cir. 1977).

[124] 438 U.S. at 780.

[125] *Id.* at 741.

[126] *Id.* at 741-42 n.17.

[127] *See* notes 8 & 9 *supra*.

[128] *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

justified by reliance on the reasoning used to uphold the FCC's fairness doctrine:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.[129]

There is even a more fundamental difficulty with the Court's rationale in *Pacifica*. Even assuming that broadcast expression is subject to a special first amendment standard, the content of that standard remains a difficult constitutional issue which might have been, but was not avoided by the means of sensitive statutory construction of 18 U.S.C. § 1464.

The potential consequences of the Supreme Court's substantive construction of section 1464 are immense. Justice Stevens' majority opinion casts doubt on several previous Supreme Court decisions, thereby raising the possibility that many constitutional issues heretofore thought to be firmly settled will now be subject to relitigation. The constitutionality of the substantive definition of indecency as nonconformance with accepted standards of morality offered by Justice Stevens is dubious. In past cases the Court has held that the standard of "immorality" is both substantively violative of the first amendment[130] and void for vagueness.[131] Once it is recognized that the standard embraced by the *Pacifica* majority appears broad enough to encompass discussions of depictions of violence,[132] racial or ethnic epithets,[133] and much religious programming,[134] the significance of the Court's departure from precedent is apparent. Indeed, it is not even clear that ordinary cereal advertisements could not be found censorable under the Court's definition of indecency as mere nonconformance with accepted standards of morality.[135]

Justice Stevens has stated in another case that "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of

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[129] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

[130] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

[131] Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954).

[132] *But see* Note, *The Regulation of Televised Violence*, 26 STAN. L. REV. 1291 (1974); Note, *Violence on Television*, 6 COLUM. J.L. & SOC. PROB. 303 (1970).

[133] *Cf.* D. BELL, RACE, RACISM AND AMERICAN LAW 357 (1973), *citing* FCC News Report No. 10844 (1972) (refusal to ban the word "nigger" as patently offensive).

[134] *Cf.* Palmetto Broadcasting Co., 33 F.C.C. 250 (1962) (patently offensive standard not applicable to religious or controversial issue broadcasting). *But see* Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933) (affirming denial of license renewal largely on grounds of offensive religious programming).

[135] *See, e.g.*, Thain, *Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act*, 56 B.U. L. REV. 651 (1976); Wolinsky & Econome, *Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children*, 4 HAST. CONST. L.Q. 249 (1977); Note, *Unsafe for Little Ears? The Regulation of Broadcast Advertising to Children*, 25 U.C.L.A. L. REV. 1131 (1978).

the First Amendment."[136] While he may believe in differential standards of constitutionality for civil and criminal statutes,[137] the prior Supreme Court cases rejecting the "immorality" standard have done so in the civil statute context.[138] In any event, the statute at issue in *Pacifica* was a criminal statute. It hardly seems an adequate response to this fact to state, "we need not consider any question relating to the possible application of § 1464 as a criminal statute" because in *Pacifica* civil penalties were threatened by the FCC.[139] Is the implication here that section 1464, as construed in *Pacifica*, is to be held unconstitutional if applied as a criminal, rather than civil, statute? Such an interpretation hardly seems to constitute the avoidance of constitutional decisionmaking. On the other hand, if Justice Stevens meant to imply that section 1464 will be given one construction as a civil statute and a second as a criminal statute, other difficulties arise. This hardly seems a realistic interpretation of legislative intent. Neither is it calculated to avoid the decision of constitutional questions. Instead, it casts doubt on the vitality of the Court's unanimous holding in *FCC v. American Broadcasting Co.*: "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."[140]

The Supreme Court's holding that "obscene, indecent and profane" language in section 1464 should be construed as prohibiting three separate and distinct classes of expression also threatens to promote litigation as to the permissibility and scope of FCC authority to proscribe the broadcast of "profane" speech. There is judicial precedent for the definition of the statutory term profane found in section 1464. In 1931 the Ninth Circuit Court of Appeals affirmed the conviction of a person for "having referred to an individual as 'damned,' having used the expression 'By God' irreverently, and having announced his intention to call down the curse of God upon certain individuals."[141] The FCC, relying on this dubious precedent, has used the profanity standard to justify the revocation of a Citizens Band license. Recognizing that its action was "not wholly consistent with *Brustyn v. Wilson*,"[142] the FCC noted merely that it was not the appropriate body to be concerned with questions of constitutionality.[143] Despite the fact that the Supreme Court has consistently held that the first amendment protects profane expression,[144] *Pacifica* casts doubt on these precedents and raises the possibility that this constitutional issue will again have to be resolved by the Court.

Finally, the indecency standard endorsed in *Pacifica* promises a new spate

[136] Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting).

[137] *Id.* at 317.

[138] *See* notes 129-30 *supra*.

[139] 438 U.S. at 739 n.13.

[140] 347 U.S. 284, 296 (1954).

[141] Duncan v. United States, 48 F.2d 128 (9th Cir. 1931).

[142] 343 U.S. 495 (1952).

[143] *In re* Warren J. Currence, 33 F.C.C. 827, 834-35 n.16 (1962).

[144] *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

of litigation concerning the ascertainment and application of the "contemporary community standards for the broadcast medium"[145] by which the question of indecency is to be determined. This issue, which has provoked a great deal of obscenity litigation,[146] is even more important here because the Court-approved definition of indecency omits the obscenity safeguards that the expression appeal to the prurient interest, be judged as a whole, and lack serious literary, political, artistic or scientific value.[147] Inasmuch as the issue did not arise in *Pacifica* because the radio station conceded that the Carlin broadcast was patently offensive,[148] the question of whether the FCC should apply local or national contemporary community standards remains to be authoritatively decided. Given the Court's concern for the protection of children and the FCC's ostensible limitation of its proscription to those times of the day when children might be in the broadcast audience,[149] it seems clear that children may be included in the definition of the relevant community. This does not settle the question, however, of which children might be so included. Inasmuch as the Court evidenced a particular concern for the protection of children too young to read,[150] the question arises whether the FCC can include pre-schoolers specifically in its definition of the relevant community.

The application of the contemporary community standards concept presents even more constitutional issues for resolution. Thus, once the relevant community standards are determined, the FCC must still determine whether the challenged broadcast material violates those standards. Unless the commissioners are to apply their own personal predilections, the application of the community standards formula to a particular broadcast promises to be a difficult, if not necessarily impossible, litigation-producing task.[151] Even assuming this problem can be satisfactorily resolved, little is accomplished if the FCC's goal is to impose a civil penalty. The licensee can simply refuse to pay the penalty and thereby require the U.S. attorney to initiate a *de novo* forfeiture action where the determination of indecency can be relitigated in a forum where a different contemporary community standard would probably be applied.[152]

All of the difficulties attendant to the ascertainment and application of the contemporary community standards concept derive from the artificiality of the concept as utilized by the FCC and endorsed by the Supreme Court. Simply stated, the FCC has never attempted to determine the actual community acceptability of the broadcasts it wishes to proscribe. Instead it

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[145] 438 U.S. at 731-32, *quoting* Pacifica Foundation, Station WBAI-FM, 56 F.C.C.2d at 98.

[146] *See, e.g.*, Smith v. United States, 431 U.S. 291 (1977); Hamling v. United States, 418 U.S. 87 (1974); Miller v. California, 413 U.S. 15 (1973).

[147] *See* text at notes 112-14 *supra*.

[148] 438 U.S. at 739.

[149] *Id.* at 733, 749-50.

[150] *Id.* at 749.

[151] *See* Waples and White, *Choice of Community Standard in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law*, 64 VA. L. REV. 399, 417-18 (1978); Note, *Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscentiy*, 61 VA. L. REV. 579 (1975).

[152] *See* Waples and White, *supra* note 151, at 418.

has undertaken to enforce a standard of acceptability which the commissioners of that agency believe appropriate. Thus, in *Pacifica*, for example, the only indication of community disapproval of the broadcast of the Carlin monologue was a single listener complaint.[153] It would seem, on first impression, that the fact that only one listener in the entire city of New York found the broadcast sufficiently offensive to justify the minimal effort and expense of filing a letter of complaint would constitute the best evidence that the vast majority of the radio station's listening audience, the contemporary community for this broadcast medium, did not find the Carlin monologue patently offensive (or at least found the monologue enjoyable despite or because of its alleged offensiveness). As noted by the District of Columbia Circuit, this reasoning has particular strength when applied to the electronic media:

> The Commission assumes that absent FCC action, filth will flood the airwaves. Thus the Commission argues that the alternative of turning the dial will not aid the sensitive person in his efforts to avoid filthy language. The *Order* provides no empirical data to substantiate this assumption. Moreover, the assumption ignores the forces of economics and of ratings on the substance of programming. Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears. Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills. If they are correct, and if the Commission truly seeks only to enforce community standards, the market should limit the filth accordingly.[154]

The Supreme Court responded to this argument by noting the "prosperity of those who traffic in pornographic literature and films"[155] and suggesting that it was unlikely that "[s]mut [would] drive itself from the market. . . ."[156] In one sense the Supreme Court's observation is virtually irrefutable. Despite the differences in market structure between the motion picture and publishing industries and the broadcast industry, every parent is aware of the sorry lack of wholesome movies in today's society, and there is no guarantee that the invisible hand of the marketplace would not affect television programming in a similar fashion. As true as this may be, however, it is hardly an adequate response to the argument that the FCC is not realistically seeking to enforce actual community standards but instead its own conception of proper programming choice. If the smut successfully drives *Sesame Street* off the air,

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[153] 438 U.S. at 730. *See also* Sonderling Broadcasting Co., 41 F.C.C.2d 919 (1975) (top-rated radio program); WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 409 n.2 (1970) (no listener complaints made to station); Jack Straw Memorial Foundation, 21 F.C.C.2d 833, 835 (1970) (one complaint).

[154] Pacifica Foundation v. FCC, 556 F.2d 9, 18 (D.C. Cir. 1977) (emphasis in original) (footnotes omitted), paraphrasing Note, *supra* note 151, at 615.

[155] 438 U.S. at 744 n.19.

[156] *Id.* (quoting Bazelon, C.J., in Pacifica Foundation v. FCC, 556 F.2d at 35).

it will be only because the majority of television viewers prefer to watch smut. There may be good policy reasons for allowing the government to interfere with the viewing preferences of the broadcast audience and the economically motivated programming choices of the broadcasters in order to prevent this from occurring. But the argument that the FCC is only enforcing the contemporary community standards contradicts reality. As long as the ostensible standard remains that of a hypothetical and unrealistic contemporary community, great difficulties will continue to be presented necessitating artificial rationales for judicial decisionmaking. And, most deplorably, this artificial and unrealistic decisionmaking, as a result of the Court's opinion in *Pacifica*, will occur on the level of constitutional interpretation.

In *Pacifica*, the Supreme Court violated the long-standing and salutary principle that statutes should be construed in such a manner as to avoid the necessity for the decision of difficult constitutional questions. The Court also ignored the honorable national tradition of unfettered expressive activity which the Court has guarded zealously in the context of nonbroadcast expression. As a result the Court not only endorsed the power of the FCC to engage in extensive regulation of the content of broadcast expression but also consciously refused to delineate any statutory limitations whatsoever on the scope of that power. Instead, the Court largely nullified section 326 as an effective limit on FCC power and construed section 1464 to give the FCC censorial powers which even the agency previously had doubted it possessed.

The Court's statutory construction in *Pacifica* also casts doubt on numerous precedents of the Court and threatens to undermine whatever stability was present in an inherently unstable area of the law. Its failure to adequately explain why or whether its mode of statutory construction was dependent upon the fact that the case involved broadcast expression threatens future consequences for constitutional doctrine outside of the context in which the case arose. Finally, the expansive construction of the statutes at issue in *Pacifica* necessitated a decision on the substantive constitutionality of the FCC's action in prohibiting the broadcast of the Carlin monologue.

IV. The First Amendment and the Broadcast of Offensive Words

The Supreme Court's strained construction of the relevant statutes which necessitated, rather than avoided, a decision of constitutional magnitude might be understandable if the Court had its doctrinal apparatus well in hand and desired to seize a unique opportunity to make a clear statement of governing constitutional principle. Unfortunately, the Court in *Pacifica* demonstrated an astounding confusion as to basic first amendment principles and a studied indifference to free speech values and precedent. While it is tempting to conclude that the only agreement which could be mustered by a majority of the Court was simply that the power of the FCC to proscribe the broadcast of the Carlin monologue should be upheld, there were three issues upon which there was general consensus.

The first point of agreement is very real and has major doctrinal importance for first amendment jurisprudence. The principle is aptly stated

by Justice Stevens: "*it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.*"[157] This passage must not be dismissed as a mere off-hand comment. Rather, it reflects the essential meaning of the first amendment command that the government not abridge freedom of speech: "its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."[158] It extends beyond the rejection of seditious libel as an offense and prohibits every governmental attempt to censor communicative activity on the grounds that it is officially deemed to express false doctrine: "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[159] And this is true in the *Pacifica* context regardless of whether "the Commission's characterization of the Carlin monologue as offensive could be traced to its political content — or even to the fact that it satirized contemporary attitudes about four letter words."[160]

The second point of agreement among the members of the Court is equally real and important. There was a general consensus that the governmental regulation at issue in *Pacifica* was based on the content of the Carlin monologue and hence subject to more rigorous judicial scrutiny than the ad hoc balancing by which the Court determines the constitutionality of regulations which are keyed solely to the time, place, or manner of the expression.[161] Thus, all members of the Supreme Court recognize that intensive scrutiny is appropriate not just for governmental regulations which explicitly discriminate on the basis of the speaker's ideological message but for all governmental regulations based on the meaning of the words or symbols conveyed by the speaker.

The third point on which all the Justices agreed in *Pacifica* was that offensive language which is not obscene is not excluded from first amendment protection.[162] Despite the fact that many Supreme Court cases have so held,[163] the unanimous agreement on this point may be deceptive. In past cases Chief Justice Burger, Justice Blackmun and Justice Rehnquist have vociferously argued that offensive language is entitled to no first amendment protection.[164] Hopefully, these three Justices, by silently joining opinions inconsistent with that view, have abandoned their untenable minority position.

The potential significance of these three points of consensus within the

[157] *Id.* at 745-46 (emphasis added) (footnote omitted).

[158] Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) (footnote omitted). *See also* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Healy v. James, 408 U.S. 169 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

[159] 438 U.S. at 745.

[160] *Id.* at 746.

[161] *Id.* at 746-47. The concurring opinion of Justice Powell, *id.* at 760 (Powell, J., concurring), and the dissenting opinion of Justice Brennan, *id.* at 768 n.3 & 773 (Brennan, J. dissenting), both proceed from an implicit acceptance of this characterization of the FCC Order.

[162] *See id.* at 747; *id.* at 756-57 (Powell, J. concurring); *id.* at 763 (Brennan, J., dissenting).

[163] *See, e.g.*, Papish v. Board of Curators, 410 U.S. 667 (1973); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Cohen v. California, 403 U.S. 15 (1971).

[164] *See, e.g.*, Eaton v. Tulsa, 415 U.S. 697, 701 (1974) (Rehnquist, J., dissenting); Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting); Gooding v. Wilson, 405 U.S. 518, 534 (1972) (Blackmun, J., dissenting).

Court should not be underestimated; nevertheless, the disarray within the Court as to the doctrinal significance and proper application of these general principles is alarming.

The opinion of Justice Stevens, while recognizing that the FCC Order was based on the content of the Carlin monologue, proceeded immediately to defeat the value of this insight by reasoning that the first amendment does not prohibit all governmental regulations based on the content of the expression[165] and that, therefore, it was appropriate for the Supreme Court to grant less first amendment protection to some expressions because their content is judicially deemed to have little social value.[166] Justice Stevens was explicit that it was only because of the slight social value of the expression that the governmental interests of protecting children and unwilling adults from the broadcast of offensive words were sufficient to uphold the FCC Order.[167] The difficulties with this reasoning go to the very heart of first amendment doctrine.

First, Justice Stevens' conclusion does not follow logically from his premise and is based on a serious misunderstanding of the precedents upon which he relies and, indeed, on the history of first amendment jurisprudence. It is true that an unguarded dictum in *Chaplinsky v. New Hampshire* stated the proposition that some expression is wholly outside the scope of first amendment protection because of its lack of social utility.[168] This dictum was, for a time, applied to other areas of first amendment concern[169] and, even today, maintains an uneasy hold on the law of obscenity.[170] But the history of first amendment adjudication has largely recognized the intellectual inadequacy of this approach. Thus, it is now clear that the government may prohibit "fighting words," not because they lack social value, but because the government has an important interest in preventing breaches of the peace.[171] Likewise, the government may make libellous statements actionable because of its interest in the protection of individual reputations. The Court was extremely cautious in *Gertz v. Robert Welch, Inc.* to premise its differential treatment of public and private persons on the greater injury suffered by the latter, rather than on any supposed difference in the social value of the

[165] 438 U.S. at 744.

[166] *Id.* at 747-48.

[167] *Id.* at 746 n.22.

[168] 315 U.S. 568, 572 (1942).

[169] *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech).

[170] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973). The weakness of the hold which the social value theory maintains on the law of obscenity is indicated by both the narrow 5-4 majority in these cases and the majority's felt necessity for identifying the governmental interests held sufficient to justify the suppression of obscene material. *See* Paris Adult Theatre I v. Slaton, 413 U.S. at 57-70.

The Court also continues to rely on the social value theory in evaluating governmental regulations of commercial speech. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978). In both cases the Court included a detailed analysis of the countervailing governmental interests and Justice Marshall's separate opinion demonstrated that the Court's reliance on a judicial assessment of the social utility of the expression was unnecessary. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 468.

[171] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969). Indeed, this was the *holding* of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

libellous expression.[172] Similarly, in the area of subversive advocacy, the rationale for the judicial affirmance of regulations proscribing speech which threatens the violent overthrow of the government was clearly stated by Justice Holmes: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[173]

Thus, the fact that the Court has upheld governmental regulations of the content of expression because of the harm which such expression causes does not justify Stevens' conclusion that it is appropriate for the Court to uphold such content regulations, depending on the context and circumstances in which the speech occurs, on the basis of a judicially supposed lack of social value. Justice Stevens' liberalized reading of the *Chaplinsky* dictum to justify only partial, rather than total, suppression of such expression[174] does not overcome the serious departure from first amendment values, principles, precedent, and tradition upon which his mode of reasoning is based.

The second difficulty with Justice Stevens' *Pacifica* rationale is that it contradicts the very grounds which have led the Court to accept the need for intensive judicial scrutiny of governmental regulations based on the content of the challenged expression. He did not argue that the message contained in the Carlin monologue lacked social value. Clearly the monologue expressed the idea "that the words it uses are 'harmless' and that our attitudes toward them are 'essentially silly.' "[175] And Justice Stevens explicitly recognized that judicial agreement or disagreement with this message was not a proper ground for decision.[176] Thus, the reliance on the premise that the expression lacked social value requires the Court to ignore the value of the speaker's message and base its decision on a judicial assessment of the utility of the particular words chosen by the speaker.[177] It assumes that the ideological message can be divorced from the words chosen to express it: "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[178]

If it is assumed that expression can be neatly divided into two separate elements — the ideological message and the form of that message — and if the Court is going to premise its decision on the supposed social value of the expression, it must make an essentially unprincipled choice between the message and the form as the referent upon which to base its finding of social utility. There is no principled reason why the Court should not characterize Carlin's message as valuable social commentary rather than inutile offensive

[172] 418 U.S. 323, 343 (1974).

[173] Schenck v. United States, 249 U.S. 47, 52 (1919). The modern test in the area of subversive advocacy is stated in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), but the underlying governmental interest remains the same.

[174] 438 U.S. at 746.

[175] *Id.* at 746 n.22.

[176] *See* text at notes 157-60 *supra*.

[177] 438 U.S. at 746-47.

[178] *Id.* at 743 n.18.

language. The more fundamental objection to Stevens' rationale is that in fact it is not possible to neatly divorce the message from the form of expression; indeed, this is precisely the basis for the intensive scrutiny which the Court has traditionally given content-based regulations of expression. Such regulations, it has been recognized, are directed at complex, indivisible "mixed utterances" which contain both good and bad elements which are inextricably intertwined.[179] Justice Harlan, recognizing this reality, stated, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[180] Justice Brennan, dissenting in *Pacifica*, explained cogently the basis for the Court's traditional acceptance of this fundamental premise:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.[181]

The wisdom of not attempting an artificial separation of message and form is demonstrated not only by the fact that a large proportion of our great literature, including the Bible, contains words deemed void of social value by Justice Stevens but also by the *Pacifica* case itself. The Carlin monologue was both a trenchant satire of society's taboo on the use of certain words and a criticism of the FCC policy which forbade the broadcast of those words. It thus fell squarely within the category of expression which is known as seditious libel and ordinarily is entitled to the greatest first amendment protection. If Justice Stevens is correct, it does not detract in the least from Carlin's monologue to limit it to the simple statement, "the government has a silly law prohibiting the use of certain words, but I can't tell you what they are." The absurdity of Stevens' position, that the impact of criticism of government policy is not lessened by the inability to identify the policy, is obvious.

The separation of message and form is artificial in another sense. The vague and limitless nature of the government's objection to the offensiveness of certain words is such that the government can easily mask its objection to the ideological message as an objection to the form in which that message is expressed. Justice Stevens has, on another occasion, recognized the infirmity of vagueness and limitlessness found in the government's asserted interest in policing the adherence to conventions of etiquette in the form of expression. It is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the constitution leaves matters of taste and style so largely to the individual."[182] It is this very characteristic which engenders the danger that "governments might soon seize upon the censorship of particular

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[179] Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 12.

[180] Cohen v. California, 403 U.S. 15, 26 (1971).

[181] 438 U.S. at 778.

[182] Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting), quoting Cohen v. California, 403 U.S. at 25.

words as a convenient guise for banning the expression of unpopular views."[183] It is not surprising that commentators who advocate government suppression of offensive words base their position on opposition to the ideological message the expression communicates more than formal considerations of etiquette.[184] There is even some force to the allegation made by Justice Brennan in his *Pacifica* dissent: "[T]he Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[185]

In any event, subsequent events have clearly demonstrated that the FCC's objection to the Carlin monologue was based on its ideological message rather than its use of offensive words. Since the Court's decision in *Pacifica*, many television stations across the country have aired a documentary entitled "Scared Straight" which is intended to show teenagers the horrors juvenile offenders face in jail. Characters in this documentary use the very words proscribed by the FCC in *Pacifica*, and use them repeatedly for their shock value in a context more likely to appeal to the prurient interest than was Carlin's monologue. Additionally, "Scared Straight" was specifically aimed at teenagers, an age group which the *Pacifica* Court deemed in need of protection from such language. Clearly the only distinction between the documentary and the Carlin monologue is the acceptability of the ideological message; yet the FCC has specifically approved the broadcast of the documentary.[186] In the future we can be certain that the Commission, acting as ideological censors, will grant similar exemptions to broadcast messages it finds acceptable.

The final flaw in Justice Stevens' rationale was his unfounded assumption that words which offend some people have no social value. In context, the reality is precisely the opposite. First, offensive words have an affirmative social value because they are inextricably intertwined with the expression of ideological messages. Thus, recognizing that as a democracy, we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[187] Justice Harlan eloquently described the social value of words found offensive by some people:

> To many, the immediate consequence of this freedom [of expression] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[188]

[183] Cohen v. California, 403 U.S. at 26.

[184] *See* A. Cox, The Role of the Supreme Court in American Government 45-48 (1976); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281, 282.

[185] 438 U.S. at 779.

[186] *See* Newsweek, April 23, 1979, at 101.

[187] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[188] Cohen v. California, 403 U.S. at 24-25. *See also* Baumgartner v. United States, 322 U.S. 665, 673-74 (1944); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

Offensive words also have social value because of their unique capacity to express the strength of conviction or other emotion underlying the idea communicated. The Supreme Court has explicitly recognized that words have an emotive value which no synonym can adequately capture:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[189]

It simply cannot realistically be thought that when an individual says on the radio, "Political change is so fucking slow,"[190] that the statement "Political change is very slow" conveys the same depth of sincerity, anger, and frustration. Similarly if the law demands that the phrase "Repeal the Draft" be substituted for "Fuck the Draft," "[c]learly something is lost in the translation."[191] Indeed, it is precisely because of the strength of the anger and frustration, because the individual is so seriously at odds with society, that the message is important to hear.[192]

Finally, offensive words have an affirmative value because they "may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation."[193] Indeed, the Office of the President of the United States during the tenure of Richard Nixon was one of these "subcultures" where the use of words found offensive by many was a frequent occurrence. The proscription of the broadcast of such words thus threatens to inhibit the broadcasting of both the views of members of these subcultures and information about the activities and concerns of these individuals.[194]

In light of the serious difficulties with the plurality's rationale for upholding the FCC Order, it is not surprising that the concurring opinion of Justices Powell and Blackmun specifically rejected Stevens' "theory that the Justices . . . are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."[195] Instead, the concurrence reasoned that the FCC Order was not violative of the first amendment because it was justified

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[189] Cohen v. California, 403 U.S. at 26.

[190] WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 409 (1970).

[191] Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?* 67 Nw. U. L. Rev. 153, 189 (1972).

[192] Kalven, *supra* note 179, at 11.

[193] 438 U.S. at 776 (Brennan, J., dissenting).

[194] *Id.* at 776 n.8. *See also* Note, *"Offensive Speech" and the First Amendment*, 53 B.U. L. Rev. 834 (1973).

[195] 438 U.S. at 761 (Powell, J., concurring).

by the government's substantial interest in protecting children and unwilling adults from involuntary exposure to the Carlin monologue.[196]

Two factors are important here. First, while Justice Stevens also relied on the presence of these two government interests, he was explicit in agreeing with the dissenters that these interests would not justify the FCC Order unless the degree of first amendment protection to the Carlin monologue was first denigrated by a finding that it lacked social value.[197] The second point is that the plurality and concurrence agreed that the special nature of the broadcast medium was a significant factor in sustaining the FCC Order.[198] Unfortunately, in relying on this rationale both opinions bootstrap a conclusion on the basis of circular reasoning. The reason why broadcasting is a unique medium, we are told, is because it intrudes on the governmental interest in protecting children and unwilling adult listeners.[199] But the only significance of the uniqueness of the medium in *Pacifica* was to justify a more lenient scrutiny of the very governmental interests which form the basis for finding the medium unique. Every medium is unique in the sense of being different in some respects from other media. The essential question, however, is whether the difference justifies governmental regulations which would be unconstitutional if applied to other media. Prior to *Pacifica* the Court had clearly held that "the basic principles of freedom of speech and the press . . . do not vary according to the medium upon which the speaker expresses a message," while at the same time recognizing that "capacity for evil . . . may be relevant in determining the permissible scope of community control."[200] It is unfortunate that the plurality and concurring opinions in *Pacifica* disregarded established precedent and invoked instead the rationale that broadcasting is a special medium, thereby avoiding a sensitive inquiry into the underlying governmental interests asserted in support of a substantial restriction of the freedom of expression guaranteed by the first amendment.

Both the plurality and concurring opinions found that, in the broadcasting context, the interest in protecting children from exposure to words deemed indecent by the FCC was adequate to justify the proscription of the airing of the Carlin monologue at two o'clock in the afternoon on a school day.[201] Although the Court explicitly left open the question of whether such broadcasts would be permissible during the late night hours,[202] the times available for such broadcasts, if the Court is serious about the need to protect children, are rare indeed since statistics demonstrate that youngsters constitute a significant portion of the broadcast audience until 1:30 a.m. daily.[203] In this light it is difficult to refute the assessment of Chief Judge Bazelon that "[a]dults with normal sleeping habits will be limited to programs

[196] *Id.* at 756-62 (Powell, J., concurring).

[197] *Id.* at 745 n.20.

[198] *Id.* at 748-49; *id.* at 761-62 (Powell, J., concurring).

[199] *Id.* at 748-49; *id.* at 756-62 (Powell, J., concurring).

[200] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952). *See also* Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring).

[201] 438 U.S. at 750; *id.* at 756 (Powell, J., concurring).

[202] *Id.* at 750 n.28; *id.* at 760 (Powell, J., concurring).

[203] *See* Pacifica Foundation v. FCC, 556 F.2d at 13-14.

'fit for children.' "[204] Thus, regardless of the strength of the governmental interest in protecting children, the *Pacifica* holding would appear to validate a classic example of "burn[ing] the house to roast the pig."[205] Justice Stevens reasoned that the FCC Order did not have this effect because "[a]dults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words."[206] Unfortunately, this rationale, rather than persuasively distinguishing *Butler v. Michigan*,[207] casts doubt on another fundamental principle of first amendment jurisprudence: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[208] The *Pacifica* rationale is particularly inappropriate as applied since it ignores "the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases the medium may well be the message."[209] In addition, the alternatives offered by the Court are a significantly less effective means for communicating with adults who do not deliberately seek out Carlin's message.[210]

Justice Powell, apparently recognizing the weakness of the alternative opportunities rationale, offered a second rationale for distinguishing *Butler*. In his opinion the limitation of access to expression of adults in order to protect children was justifiable because "a physical separation of the audience cannot be accomplished in the broadcast media."[211] There are two flaws in this reasoning. First, experience indicates that physical segregation of readers of printed obscenity is impossible because of the "flourishing 'outside business' in these materials."[212] Thus, there is little foundation in fact for Powell's premise that audience separation is ever really possible. The second, and more fundamental, flaw in Powell's reasoning is his faulty generalization from obscenity to materials which are merely indecent. The limited class of material deemed obscene can be easily labelled as suitable for adults, but the class of material which might be thought indecent is nearly limitless. Physical labelling may be possible, but it certainly seems inappropriate that the Holy

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[204] *Id.* at 27 (Bazelon, C.J., concurring).

[205] Butler v. Michigan, 352 U.S. 380, 383 (1957). *See also* Pinkus v. United States, 436 U.S. 293, 297 (1978) ("children are not to be included . . . as a part of the 'community' as that term relates to 'obscene materials' . . .").

[206] FCC v. Pacifica Foundation, 438 U.S. at 750 n.28. *See also id.* at 760 (Powell, J., concurring).

[207] The statute at issue in *Butler* did not ban the sale or distribution of all material deemed unsuitable for children, only *books*. Butler v. Michigan, 352 U.S. 380, 381 (1957). Thus, under the statute, adults had uninhibited access to such material via movies, records, tapes, and even radio and television.

[208] Schneider v. State, 308 U.S. 147, 163 (1939). *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 n.15 (1976); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974) (per curiam); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).

[209] 438 U.S. at 774 (Brennan, J., dissenting).

[210] *See* Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 93 (1977). *See also* text at notes 253-55 *infra*.

[211] 438 U.S. at 758 (Powell, J., concurring).

[212] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.7 (1973). *See also* Kaplan v. California, 413 U.S. 115, 120 (1973); United States v. Twelve 200 Ft. Reels of Super 8mm. Film, 413 U.S. 123, 129 (1973).

Bible be required to be sold in a brown wrapper labelled "indecent" because it contains words which some consider unseemly for children.[213]

Even if *Pacifica* did not have the unfortunate effect of severely curtailing the first amendment rights of adults in the broadcast audience, its finding that the governmental interest in protecting children is adequate to justify depriving them of access to the Carlin monologue is difficult to square with Supreme Court precedent. The Court has uniformly held that children possess significant first amendment rights,[214] although these rights are somewhat less than those possessed by adults.[215] Thus, the Court had held that material, even though constitutionally protected as to adults, could be proscribed for children if it appealed to their prurient interest, was patently offensive to them, and had no redeeming social value for them.[216] In *Erznoznik v. City of Jacksonville*,[217] the Court made it explicit that this constituted the outer limit of permissible governmental protection of children from unseemly material: "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[218] And, in *Carey v. Population Services International*,[219] the Court held that the advertising of contraceptives to children, even though offensive as to children, could not be proscribed.[220] In *Pacifica*, however, Justice Stevens, making no effort to distinguish *Erznoznik* and *Carey*, explicitly stated that children have no first amendment right to see, hear, or read material deemed indecent by some governmental authority: "Bookstores and motion picture theatres, for example, may be prohibited from making indecent material available to children."[221]

It is inconceivable that *Pacifica* was intended to overrule these two recent Burger Court decisions *sub silentio*. In any event, it is difficult to locate any convincing reason why the government should be empowered to proscribe children's access to indecent material either entirely or merely on the electronic media. Contrary to the unsupported assertion of Justice Powell that the "language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts,"[222] there is no

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[213] *See* 438 U.S. at 771 n.5 (Brennan, J., dissenting). As pointed out by Justice Brennan, many of the classics, including the works of Auden, Becket, Burns, Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Shakespeare, and Swift, would have to be labelled indecent. Even particular issues of newspapers and national news magazines would be subject to a labelling requirement. *See* Pacifica Foundation v. FCC, 556 F.2d at 17.

[214] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[215] *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

[216] Ginsberg v. New York, 390 U.S. 629 (1968).

[217] 422 U.S. 205 (1975).

[218] *Id.* at 213-14.

[219] 431 U.S. 678 (1977).

[220] *Id.* at 701.

[221] 438 U.S. at 749. Justice Powell expressed a similar viewpoint in his concurring opinion ("society may prevent the general dissemination of such speech to children. . . . "). *Id.* at 758 (Powell, J., concurring).

[222] *Id.*

empirical evidence that the exposure to indecent material causes any harm to children.[223] Logically, the first time a child hears a particular word, it is merely a sound without meaning and thus incapable of causing harm to the child. A youngster's vocabulary is only enlarged[224] when an adult explains the meaning of the word. At this time the harm, embarrassment to the adult, is not done to the child and, in any event, seems too trivial for judicial cognizance.[225] After the child has learned the meaning of the word, it is difficult to understand what injury can be accomplished by a second exposure. The underlying assumption in *Pacifica*, that *words* descriptive of sexual organs or functions have a deleterious effect on juveniles, is downright silly when contrasted to the Court's recent holdings that children have a constitutional right to buy and use contraceptives[226] and to secure an abortion without parental consent.[227] On what basis can such constitutional doctrine be supported, which, in effect, grants children a right to "do it" but not hear about it?

If children have a first amendment right to hear indecent words anywhere except on the electronic media, then the *Pacifica* protection-of-children rationale becomes nothing more than a make-weight argument. Two reasons have been offered to justify a partial proscription of indecent words on radio and television, but both are grossly inadequate. First, it was suggested by Circuit Judge Leventhal that "it makes a difference whether they hear [the words] in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability."[228] The difficulty with this rationale, which attempts to justify censorship on the premise of ideological opposition to the implicit message that these words are proper and acceptable in our society, rather than on the grounds that it furthers a government interest in protecting children, is that it is simply contrary to the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."[229] The holding of the Court in *Kingsley International Pictures Corp. v. Regents* is fully applicable to this rationale:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea — that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberty.[230]

The second reason offered to justify the proscription of indecent words on the airwaves is that the state may enforce the desire of many parents that their

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[223] Note, *supra* note 151, at 620-21. *Cf.* Ginsberg v. New York, 390 U.S. at 641-42 (skeptically noting that "studies" on this point have reached conflicting results).

[224] *See* 438 U.S. at 749.

[225] The same harm to children is caused by learning the meaning of the word "fuck," for example, as that inflicted by learning the meaning of the term "sexual intercourse" since the two words signify the same underlying concept.

[226] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

[227] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

[228] Pacifica Foundation v. FCC, 556 F.2d at 34 (Leventhal, J., dissenting).

[229] 438 U.S. at 745-46.

[230] 360 U.S. 684, 688 (1959).

children not be exposed to these words.[231] No one disputes the right of parents to raise their children as they see fit.[232] The question presented in *Pacifica*, however, was whether the government could deny access to materials containing indecent words to children whose parents have no objection and to consenting adults on the assumption that *most* parents prefer that their children not be exposed to indecent words on the electronic media. Prior to *Pacifica*, the Supreme Court had never allowed the government to exercise such far-reaching power over the content of expressive activities protected by the first amendment — not even in the more justifiable case of material deemed obscene as to children.[233] The reasons why the government should not be given such power are easily understood. As long as parents do not uniformly object to the broadcast of indecent words, the governmental action consists of no more than a value-laden choice between the competing wishes of two groups of parents. Indeed, what the government is doing in such a situation is essentially insulating its own rationale for censorship from effective judicial review by attributing it to one of two groups of parents. The scope of governmental power to control the content of broadcast expression thus becomes limitless, since no doubt there are some parents who object to their children being exposed to any controversial (and much noncontroversial) programming.[234] If the government is to be allowed to assert such a dangerous rationale in support of a content-based censorship of broadcast expression, the Court should at least require proof that objecting parents are less able to prevent their children's access to indecent words on radio and television than from other sources, such as books, newspapers and playmates, since it is precisely on such an improbable assumption that the Supreme Court's decision in *Pacifica* ultimately rests.[235]

The *Pacifica* reliance on the protection of captive listeners from involuntary exposure to the broadcast of the Carlin monologue as a rationale for upholding the FCC Order is no more persuasive, in light of the Court's own precedent, than its invocation of a governmental interest in the protection of children. *Pacifica* held that the simple fact that radio and television, if voluntarily turned on, have the ability to enter the sanctity of the home was sufficient to justify the FCC's proscription of a broadcast of material which some recipients might find offensive.[236] If the Supreme Court had limited its review to the particular facts of *Pacifica*, there is little or no evidence in the record to support the invocation of this governmental interest. The radio station had prefaced its broadcast of the Carlin monologue with warnings that it contained sensitive language.[237] Thus, the only listeners who might have been offended by the broadcast were those who tuned in after the

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[231] 438 U.S. at 749; *id.* at 757-58 (Powell, J., dissenting).

[232] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[233] Ginsberg v. New York, 390 U.S. 629, 639 (1968).

[234] *See* Pacifica Foundation v. FCC, 556 F.2d at 28 (Bazelon, C. J., concurring) ("Parents might also wish to shield their children from programs advancing controversial political or religious beliefs or programs discussing difficult contemporary problems such as abortion.").

[235] *See id.*

[236] 438 U.S. at 748-49; *id.* at 759 (Powell, J., concurring).

[237] *Id.* at 730.

warnings and before the monologue concluded a few minutes later and who were unable to tune out in time to avoid a sensitive word. The record in *Pacifica* disclosed that in the entire city of New York, there was one person who fit this description, and there was no evidence that anyone was offended while in the refuge of a private residence.[238] It can only be assumed that the overwhelming majority of those who heard the broadcast did so voluntarily and found the Carlin monologue enjoyable — or at least inoffensive. Thus, the holding in *Pacifica* can only be justified on the premise that each individual is entitled to complete protection from involuntary exposure to offensive words on the electronic media.[239] But *Pacifica* itself rejects this rationale by suggesting that the broadcast of offensive words may be permissible in the late evening when it is equally likely that at least one unsuspecting individual might accidentally stumble upon an offensive word on the radio or television.[240] In the end, the protection of captive listeners rationale in *Pacifica* offers no support for the affirmance of the FCC Order.

There is a more fundamental objection to the Court's reliance on an interest in the protection of captive listeners. *Pacifica* casts doubt upon a large body of Supreme Court precedent by giving controlling weight to the single factor that broadcasting enters the home of the individual. Prior to *Pacifica* the Supreme Court always engaged in a sensitive evaluation of four considerations relevant to a proper accommodation of the competing societal interests in freedom of expression and freedom from expression. These four factors are: the nature of the affected privacy interest; the substantiality of the affected privacy interest; the existence and extent of audience captivity; and the degree to which the rights of willing listeners are infringed by the particular governmental regulation.[241]

The first factor is the nature of the asserted interest in individual privacy. On the one hand, a person may object to *any* intrusion upon tranquillity. In this situation the privacy claim is of a right to be free from all communication, or other disruption, by a particular means, at a particular time, or in a particular place. Obviously, this was not the privacy interest asserted in *Pacifica*. One who turns on a radio or television does so in order to receive some communication and is willing to accept the accompanying visual and aural intrusion upon seclusion. The asserted privacy interest in *Pacifica* was rather a claim of a right to be free from the content of a particular broadcast program. Traditionally, the Court has given much less deference to this second, content-based, privacy interest because its recognition poses a significant threat of "making the closed mind a principal feature of the open society."[242] The difference in the Court's treatment of these two privacy

[238] *Id.* at 730. The FCC maintains that millions of radio listeners "scan the dial" every day. *See* Sonderling Broadcasting Corp., 27 Rad. Reg. (P-H) 2d 285, 288 (1973); WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408, 411 (1970). This statistic has no application to *Pacifica* unless it is corrected to reflect the number of dial twisters in New York City on October 30, 1973, who happened to encounter one particular radio station, WBAI-FM, during the twelve minutes when the Carlin monologue was broadcast and were offended by what they may or may not have heard.

[239] *But see* 438 U.S. at 748-50.

[240] *Id.* at 750 n.28; *id.* at 760 (Powell, J., concurring).

[241] *See generally* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 262-72.

[242] H. KALVEN, *supra* note 83, at 159.

interests is vividly illustrated by the soundtruck cases. In the first, *Saia v. New York*,[243] the Court invalidated a local ordinance granting the chief of police the discretionary authority to prohibit the use of soundtrucks in the community because of the danger that the lack of standards in the ordinance would permit the chief of police to discriminate on the basis of the content of particular soundtruck messages.[244]In contrast, *Kovacs v. Cooper*[245] upheld a local ordinance prohibiting all soundtrucks which emit "loud and raucous noises" because the ordinance was narrowly limited to a content-neutral concern about time, place, and volume of soundtrucks.[246]

The second factor to be considered is the substantiality of the particular privacy interest. The Court has recognized that the degree of deference to be given to a claim of protected freedom from unwanted communication should vary depending on the time and place where that claim is asserted. Thus, for example, the privacy claim is strongest when asserted in the home.[247] To some extent, as the dissenters in *Pacifica* argued, the substantiality of the privacy interest is lessened when the individual asserting the interest has voluntarily invited the intrusion, as by turning on a radio or television.[248] On the other hand, too much can easily be made of this argument that, by turning on a radio or television, the person has chosen to take part in a public medium. When, as in *Pacifica*, the home listener has no knowledge of the content of a particular program, he has voluntarily entered the public domain only in the sense that one who unknowingly answers an obscene telephone call or opens an obscene letter has done so.

The third, and most important, factor which the Supreme Court, prior to *Pacifica*, found relevant to a privacy claim is the existence and extent of audience captivity. If there is no captivity, then the interest in being free of unwanted expression is not even implicated.[249] The greatest flaw of *Pacifica* is its unprecedented use of inability to avoid initial exposure to an unwanted communication as the test of audience captivity. *Pacifica* held that one who is subjected to an initial, momentary, and unconsented exposure to an offensive message is a captive listener despite the fact that this individual can easily avoid continued exposure by changing stations or turning off the receiver.[250]

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[243] 334 U.S. 558 (1948).

[244] *Id.* at 562. *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). Although *Lehman* had the effect of upholding a content-based captive audience claim, the deciding vote of Justice Douglas was explicitly grounded upon the rationale that there is a constitutional right to be free from all buscards regardless of content. *Id.* at 308 (Douglas, J., concurring).

[245] 336 U.S. 77 (1949).

[246] *Id.* at 81-82. The Court, however, has not upheld all content-neutral time, place, and manner regulations intended to protect the solitude of unwilling listeners. *See, e.g.*, Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952); Martin v. City of Struthers, 318 U.S. 141 (1943).

[247] 438 U.S. at 748; *id.* at 759 (Powell, J., concurring). *See also* Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[248] 438 U.S. at 765 (Brennan, J., dissenting). *See also* Givhan v. Western Line Consol. School Dist., 99 S. Ct. 693, 696 (1979) ("Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the *'unwilling* recipient' of her views.") (emphasis in original).

[249] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Spence v. Washington, 418 U.S. 405 (1974); Cohen v. California, 403 U.S. 15 (1971).

[250] *See* 438 U.S. at 748-49; *id.* at 760 n.2 (Powell, J., concurring).

Prior to *Pacifica*, the Court always used the ability to avoid a second, or continued, exposure to the unwanted communication as the test for audience captivity. Thus, the applicable test has been whether the unwilling recipients "could effectively avoid *further* bombardment of their sensibilities. . . ."[251] The first problem with using initial exposure as the criterion for captivity is that it is a limitless invitation to governmental suppression of communication:

> [T]his sort of "captivity" exists with respect to virtually all forms of communication. While browsing through a newspaper, the unsuspecting reader might unwittingly come across a headline or photograph he finds offensive. . . . And while strolling through a park, the individual may unintentionally overhear a speech or even a conversation he finds indecent. Society cannot, however, spin a protective cocoon around each individual, insulating him absolutely from all unwanted communications. The true measure of an individual's privacy in this context consists, not in his total protection from initial exposure to unwelcome ideas, but, rather, in his ability to avoid continued exposure to those ideas once he has rejected them.[252]

The second reason why the ability to avoid initial exposure to an unwanted message is an inappropriate criterion for audience captivity is that there exists a significant free speech interest in allowing a speaker an opportunity to arouse interest in his message by introducing it to a *potentially* willing listener: "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention."[253] In the same way that the right of free expression would be rendered worthless if speakers were confined to a "speaker's corner" of a park, it would likewise be rendered impotent in today's anonymous and busy society if a speaker is not afforded the opportunity to capture the attention of a potential audience. It is for precisely this reason that the Court's prior decisions, holding that there is no audience captivity where there exists the ability to avoid continued exposure to unwanted communication, either by averting the eyes or ears[254] or by turning off the radio, [255] strike the proper accommodation between the competing societal interests in freedom of speech and the freedom not to listen.

The final factor which should be considered is the degree to which the rights of willing listeners are infringed by a particular governmental regulation designed to protect unwilling listeners. Willing listeners possess a constitutional right of their own to receive information, and the Court has always been solicitous of this right.[256] Whenever possible, the Court has

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[251] Cohen v. California, 403 U.S. at 21 (emphasis added). *See also* Erznoznik v. City of Jacksonville, 422 U.S. at 210-11; Spence v. Washington, 418 U.S. at 412.

[252] Stone, *supra* note 241, at 267.

[253] Kovacs v. Cooper, 336 U.S. at 87.

[254] *See* Erznoznik v. City of Jacksonville, 422 U.S. at 210-11; Spence v. Washington, 418 U.S. at 412; Cohen v. California, 403 U.S. at 21.

[255] *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974); Rowan v. Post Office Dep't, 397 U.S. 728, 737 (1970); Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

[256] *See* 438 U.S. at 765 (Brennan, J., dissenting); Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

required that governmental regulations be narrowly tailored to protect the unwilling listener without infringing upon the equally meritorious rights of those who may wish to hear the speaker's message.[257]

By considering the fourth factor in conjunction with the other relevant considerations, it is readily apparent that *Pacifica* constitutes a sharp and unjustifiable departure from the Court's own precedent in cases implicating the interest in freedom from unwanted communication in the home. In *Rowan v. Post Office Department*,[258] the Court upheld a statute which authorized recipients of unsolicited mail to enlist the aid of the United States government to prevent additional mailings from the same sender. *Pacifica* relied heavily on *Rowan* in justifying its proscription of the broadcast of the Carlin monologue, but the differences between the two cases are so great that *Rowan* offers little support for the Court's decision in *Pacifica*. Unlike *Pacifica*, the statute at issue in *Rowan* made no attempt to prevent the initial exposure of the unconsenting recipient but only prohibited continuing mailings after the individual, on the basis of the first mailing, affirmatively registered an objection.[259] The statute in *Rowan* was also content-neutral insofar as the government was concerned. The statute on its face applied only to erotically arousing or sexually provocative material, but the determination of whether a mailing was within this category was left to the "complete and unfettered discretion" of the recipient.[260] In order to avoid the difficult constitutional questions which would arise if the government was given any authority to act on the basis of the content of the materials, the statute empowered the homeowner to "prohibit the mailing of a dry goods catalog because he objects to the contents."[261] Finally, the Court made it clear that this expansive power to prevent unwanted communication in *Rowan* was constitutionally permissible because the unwilling recipient was given no authority under the statute to prevent mailings to any household other than his own.[262]

A second possible situation, illustrated by *Martin v. City of Struthers*,[263] is where the government attempts, on a content-neutral basis, to protect the interest of the unwilling recipient by prohibiting communication to an entire community. In *Martin* the Court invalidated an ordinance which prohibited all door-to-door distribution of handbills or circulars on the grounds that it "substitute[d] the judgment of the community for the judgment of the individual householder" and thus infringed upon the right of willing recipients to receive such handbill distributions.[264]

In *Organization for a Better Austin v. Keefe*[265] the Court vacated an injunction prohibiting the distribution of literature in a residential communi-

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[257] *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965); Martin v. City of Struthers, 319 U.S. 141 (1943).

[258] 397 U.S. 728 (1970).

[259] *Id.* at 729-30.

[260] *Id.* at 734.

[261] *Id.* at 737.

[262] *Id.* at 736-37.

[263] 319 U.S. 141 (1943).

[264] *Id.* at 144. The Court suggested that the less drastic alternative of an ordinance prohibiting door-to-door distribution to those who have previously expressed a desire to remain undisturbed would pass constitutional muster. *Id.* at 148.

[265] 402 U.S. 415 (1971).

ty. Here, one step removed from *Martin*, the individual, a real estate broker accused of engaging in blockbusting practices by picketers in front of his home, attempted to invoke a content-neutral governmental regulation in order to vindicate a content-based interest in being free from the presentation of the picketers' message in front of his home. The Supreme Court's response was succinct: "*Rowan* . . . , relied on by respondent, is not on point; the right of privacy involved in that case is not shown here. Among other important distinctions, respondent is not attempting to stop the flow of information into his own household, but to the public."[266]

Finally, there is the situation, analogous to that found in *Pacifica*, where two crucial factors coincide. First, "the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others."[267] When the government's interest in protecting the unwilling listener is based on the content of the expression, "the First Amendment strictly limits its power."[268] Second, the governmental regulation prohibits both willing and unwilling recipients from receiving the communication. Here, it was clear that, prior to *Pacifica*, the governmental regulation cannot withstand constitutional scrutiny. Thus, in *Lamont v. Postmaster General*[269] the Court invalidated a statute which required the Postmaster General to detain Communist political propaganda, notify the addressee, and deliver it only upon receipt of an authorizing postcard from the intended recipient. If the government cannot constitutionally impose the slight burden of returning a postcard on a willing recipient in order to protect unwilling recipients from the content of material the government finds inappropriate, then it is difficult to comprehend how the extensive burden placed on willing listeners by *Pacifica* can be constitutionally justified. Indeed, the observation of Justice Brennan seems irrefutable:

> The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals comprising the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.[270]

V. Conclusion

In *Pacifica*, the Supreme Court had a unique opportunity to confront the chasm which exists between our nation's long and honored tradition of free expression and the anomalous regulation of the content of broadcast expression administered by the Federal Communications Commission.

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[266] *Id.* at 420.

[267] Erznoznik v. City of Jacksonville, 422 U.S. at 209.

[268] *Id.*

[269] 381 U.S. 301 (1965).

[270] 438 U.S. at 766 (Brennan, J., dissenting).

Rather than attempting to offer a rational justification for the differential treatment of the broadcast media, the Court begged the question by identifying two factors, the presence of children and the presence of unwilling adults, which characterize the broadcast media, and then relied upon the existence of those two factors as a rationale for avoiding judicial inquiry into their sufficiency as grounds for suppressing the content of expression found distasteful by the FCC. In addition, the Court, contrary to fundamental free speech theory, endorsed an expansive bureaucratic framework for the control of the content of broadcast expression by administrative censors. Instead of construing the governing statutes consistently with our national tradition of unfettered expression, the Court gave them a dubious construction, granting the FCC more authority over the discussion of public issues on the airwaves than the agency ever believed it possessed. Sadly, the result of *Pacifica* is "the worst of all possible worlds. There is official lip service to freedom of the press in broadcasting but no agreement that there is anything the Commission cannot do."[271]

Hopefully, *Pacifica* will be limited to its particular facts and classified by courts and commentators alike as an unfortunate aberration. Nevertheless, the Court's cavalier violation of the principle of construing statutes so as to avoid questions of constitutional magnitude, surprising indifference to its own free speech precedents, and appalling insensitivity to first amendment doctrines, values, and traditions bodes ill for the future.

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[271] Kalven, *supra* note 1, at 37-38.